ATTACHMENT B

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN*

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE ROBERT BUNDY, Defendant.	MEMORANDUM OPINION AND ORDER (Re: Motion to Strike the Death Penalty From Consideration)

On May 16, 1977, the defendant filed a Motion to Strike the Death Penalty from Consideration in this case on numerous grounds, including violation of the prohibition of cruel and unusual punishment pursuant to the Eighth and Fourteenth Amendments to the Constitution of the United States of America. The motion was argued on June 7, 1977 and again on June 23, 1977. The People were represented by Deputy District Attorney Milton Blakey, Esq. of the Fourth Judicial District, who had been appointed as a deputy district attorney in the Ninth Judicial District for the purpose of this case. Defendant represented himself and was assisted by James F. Dumas, Jr., Chief Deputy Public Defender, who at the time was acting as advisory counsel for the defendant.

The Court has considered the motion and argument of counsel and the briefs filed by counsel and, on the basis thereof, issues the following opinion and order.

The defendant is charged with the crime of first degree murder under the laws of the State of Colorado, pursuant to a statute which provides:

> "18-3-102. Murder in the first degree. (1) A person commits the crime of murder in the first degree if: (a) After deliberation and with the

*Transferred to El Paso County prior to entry of Order.

> intent to cause the death of a person other than himself, he causes the death of that person or of another person; ..." C.R.S. 18-3-102 (1973), as amended.

Murder in the first degree is a class one felony. Id.

Upon conviction of a class one felony, a separate sentencing hearing is to be conducted before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment. C.R.S. 16-11-103 (1973), as amended. That statute is lengthy and is set forth in full in the appendix to this opinion.

Defendant contends that to impose the death penalty upon conviction of the crime with which he is charged would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

Decisions of the United States Supreme Court in recent years provide guidelines to determine whether a punishment is cruel and unusual in the Eighth Amendment sense. If the procedures for imposing sentence create a substantial risk that the sentence will be imposed arbitrarily or capriciously, the punishment may be cruel and unusual. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972); Gregg v. Georgia, _____U.S._____, 96 S. Ct. 2909 (1976). If the punishment is excessive, it is cruel and unusual punishment. See Gregg v. Georgia, supra.

Punishment may be excessive either because it involves unnecessary or wanton infliction of pain or because it is grossly out of proportion to the severity of the crime. See Gregg v. Georgia, supra. In Coker v. Georgia, _____U.S._____, 97 S.Ct. 2861 (1977), a death sentence was held to be grossly out of proportion to the severity of the crime of rape of an adult woman.

The Eighth Amendment prohibition of cruel and unusual punish-

ment is not a static concept. "(t)he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, at p. 101 of 356 U.S., cited in Gregg v. Georgia, supra. "But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with 'the dignity of man' which is the 'basic concept underlying the Eighth Amendment.' Trop v. Dulles, supra..." Gregg v. Georgia, at p. 2925 of 96 S.Ct.

The death penalty does not constitute cruel and unusual punishment under all circumstances. Gregg v. Georgia, supra; Proffitt v. Florida, _____U.S._____, 96 S.Ct. 2960 (1976); Jurek v. Texas, _____U.S._____, 96 S.Ct. 2950 (1976). Murder is an offense for which, under appropriate circumstances, the death penalty may be imposed. Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas, supra.

In the process of deciding whether the death penalty is to be imposed, consideration of the character and record of the individual offender and the circumstances of the offense are constitutionally required. Woodson v. North Carolina, _____U.S._____, 96 S.Ct. 2978 (1976). In that case, it is stated by the plurality at p. 2991 of 96 S.Ct:

> "While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlyi the Eighth Amendment, see Tropp v. Dulles, 356 U.S., at 100 78 S.Ct., at 597 (plurality opinion), requires consideratio of the character and record of the individual offender and the circumstances of the particular offense as a constituti ally indispensable part of the process of inflicting the penalty of death."

Thus, a statute making the death penalty mandatory for first degree murder, which included any deliberate and premeditated homicide and any felony murder, without regard to the character and record of the individual offender or the circumstances of the offense is

unconstitutional. Woodson v. North Carolina, supra. Even if a mandatory death penalty statute limits the crimes for which death is to be imposed to narrowly drawn categories of first degree murder, the same constitutional infirmity exists if the sentencing procedures do not permit consideration of the character and record of the offender and the circumstances of the offense. Stanislaus Roberts v. Louisiana, _____U.S._____, 96 S.Ct. 3001 (1976). And even where a mandatory death penalty statute relates to the narrow category of killing a human being when the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or peace officer who was engaged in the performance of his lawful duties, the imposition of the penalty is unconstitutional. Harry Roberts v. Louisiana, _____U.S._____ 97 S.Ct. 1993 (1977); Washington v. Louisiana, 428 U.S. 906, 96 S.Ct. 3214 (1976). In Harry Roberts, the Court said, at p. 1995 of 97 S.Ct.

> "To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravated circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions."

> "As we emphasized repeatedly in Roberts* and its companion cases decided last term, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow consideration of particularized mitigating factors, it is unconstitutional."

See Jurek v. Texas, supra, at p. 2958 of 96 S.Ct., where it is said:

> "What is essential is that the jury have before it all possible relevant information about the individual

*Stanislaus Roberts v. Louisiana, supra.

> defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced."

The Court in Harry Roberts v. Louisiana, supra, left open the question whether a mandatory death penalty might pass constitutional muster where based upon intentional killing by a person serving a life sentence. It suggested that such a situation presents "a unique problem that may justify such a law" Harry Roberts v. Louisiana, supra, at p. 1995, footnote 2, and at p. 1996, footnote 5, of 97 S. Ct.

Although striking down the mandatory death penalty statutes, the Court has upheld the constitutionality of certain death penalty statutes which permitted consideration of mitigating circumstances. Gregg v. Georgia, supra; Proffitt v. Florida, supra; Jurek v. Texas, supra.

The purposes for which evidence of mitigating circumstances may be received under the Georgia, Florida and Texas statutes and the procedures under those statutes for determination of the appropriate penalty are instructive in determining the scope of evidence of mitigating circumstances and the purpose of such evidence which are mandated by the United States Constitution. The statutes of these three states will be considered individually, and the Colorado statute will then be compared to them.

Florida:

The Florida statute provides for a bifurcated trial, with the sentencing stage to take place before the same jury which determined guilt.

The Florida statute contains eight aggravating circumstances, and the following seven mitigating circumstances:

> "(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime." Sec. 921.141(6) (Supp. 1976-1977), Florida statutes, cited in Footnote 6 of Proffitt v. Florida, supra, at p. 2965 of 96 S.Ct.

At the sentencing stage, "Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances." (Emphasis added). (Conclusion as stated by the United States Supreme Court in Proffitt v. Florida, supra, at p. 2964 of 96 S.Ct.) The jury is directed to consider "(w)hether sufficient mitigating circumstances exist...which outweigh aggravating circumstances found to exist; and...(b)ased on these considerations, whether the defendant should be sentenced to life (imprisonment) or death." Florida statute, quoted in Proffitt v. Florida, supra, at p. 2965 of 96 S.Ct. The jury determination is by majority vote and is advisory only. In order to sustain a death sentence following a jury recommendation of life "...the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Florida; 1975), quoted in Proffitt v. Florida, supra, at p. 2965 of 96 S.Ct. The trial court must then weigh the statutory aggravating and mitigating circumstances in imposing sentence. If a death sentence is imposed, the trial court must make written findings of fact that sufficient statutory aggravating circumstances exist and that there are insufficient statutory

mitigating circumstances to outweigh the aggravating circumstances. Proffitt v. Florida, supra, citing the Florida statute.

Thus, under the Florida statute, it appears that the jury may consider evidence of mitigating factors not limited to those on the statutory list and that if such consideration results in the recommendation of life imprisonment, the trial court can impose a death sentence only if the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. It appears that some types of evidence of mitigation would not be subject to consideration or use by the trial judge in determin a sentence after the jury had recommended death; i.e., there are types of mitigating evidence, such as positive contributions by the defendant to his family or community, which would not be logically relevant to any of the mitigating circumstances on the statutory list. The judge's function is to weigh the statutory aggravating circumstances against the statutory mitigating circumstances. Notwithstanding this limitation to the statutory lists, the court concluded that "To answer these questions (the questions posed by the statutory aggravating and mitigating circumstances)...the sentencing judge must focus on the individual circumstances of each homicide and each defendant." Proffitt v. Florida, supra, at p. 2966 of 96 S.Ct.

Georgia:

The Georgia statute provides for a bifurcated trial, with the sentencing stage to take place before the same jury which determined guilt. At the sentencing stage,

> "The judge (or jury)* shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas..."
> Georgia statute, quoted in Gregg v. Georgia, supra,

*I.e., the trier of fact at the guilt stage.

at p. 2920 of 96 S.Ct.

Under Georgia case law, the defendant is accorded substantial latitude as to the types of evidence he may introduce, and the jury may consider the evidence adduced at the guilt stage. Gregg v. Georgia, supra. In determining sentence, the jury is to consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of (10) statutory aggravating circumstances which may be supported by the evidence..." Georgia statute, quoted in Gregg v. Georgia, supra, at p. 2921 of 96 S.Ct. The scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the statute. The jury imposes a binding recommendation of sentence, and the death sentence may be imposed only if one of the statutory aggravating circumstances is found to exist beyond a reasonable doubt and the jury then elects to impose the death sentence. Gregg v. Georgia, supra. The jury must specify the aggravating circumstances found if its recommendation is death.

Texas:

Texas limits capital homicides to five specific types of especially serious homicides.

The Texas statute provides for a bifurcated trial, with the sentencing stage to take place before the same jury which determined guilt. At the sentencing stage, any relevant evidence may be produced. The jury is then required to answer the following three questions:

> "(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberatel and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) Whether there is a probability that the defenda would commit criminal acts of violence that would constitu a continuing threat to society; and
>
> (3) If raised by the evidence, whether the conduct the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Texas statute, quoted in Jurek v. Texas, supra, at p. 2955 of 96 S.Ct.

The People have the burden of establishing beyond a reasonable doubt that the answer to each question is yes. If the answer to all three questions is yes, the death penalty results. If any one of the answers is no, the sentence is life imprisonment. The Texas courts have construed the second question to allow the defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show, including criminal record, age, duress, mental or emotional pressure, lack of remorse, and psychiatric evidence relevant to predicting future conduct. The Court concluded that the Texas law permits the jury to be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. Jurek v. Texas, supra. It may be that there are types of mitigating circumstances which, although admissible under Texas law, would have no logical relevance, or highly limited logical relevance, in determining the answer to any of the three questions which are put to the jurors at the sentencing stage. Thus, there is a question whether the jury could legitimately "consider" such types of mitigating circumstances in any manner which would have an effect on the outcome of the hearing. This question is not discussed by the Court.

The Court considered the narrowing of the types of capital homicides to five especially serious types to serve much the same function as providing the jury with a list of aggravating circumstances.

Colorado:

The Colorado statute provides for a bifurcated trial, with the sentencing stage to take place before the same jury which determined guilt. At the sentencing hearing, "...any information relevant to any of the aggravating or mitigating factors set forth in... (another section of the statute) ...may be presented by either

the people or the defendant..." C.R.S. 16-11-103(2) (1973). The jury must render a verdict as to the existence or nonexistence of each of the statutory mitigating and aggravating factors. If the verdict is that none of the statutory mitigating factors exists and that one or more of the statutory aggravating factors exists, the court must sentence the defendant to death. Any other combination of findings results in a sentence to life imprisonment. The statutory mitigating factors may be summarized as: (1) under the age of 18, (2) impairment of capacity to appreciate wrongfulness of conduct or to conform conduct to requirements of law, (3) duress, (4) relatively minor participation in offense committed by another and (5) inability reasonably to foresee that his conduct would cause or create a grave risk of death to another. Seven of the eight statutory aggravating factors focus on the nature of the offense; the eighth relates to prior conviction for a crime involving a penalty of life imprisonment or death. C.R.S. 16-11-103 (1973).

Under the Colorado statute, being under the age of 18 is the only aspect of defendant's personal background and circumstances, other than mental condition at the time of the crime, which can be considered. Whether defendant is just 18 or an experienced, mature adult has no relevance. Defendant's criminal record or lack thereof has no relevance. His past contributions to family or community, his remorse or lack thereof and other factors which reflect defendant's character and background have no relevance. In Woodson v. North Carolina, supra, in the course of holding the consideration of the character and record of the individual offender to be a constitutionally indispensable part of the process of inflicting the penalty of death, it was said by the plurality at p. 2991 of 96 S.Ct:

"A process that accords no significance to relevant

> facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."

In summary, Florida, Georgia and Texas all allow the defendant substantial latitude in introduction of evidence of mitigating circumstances at the sentencing stage in a capital case. Direct use of that evidence by the jury is an important part of determination of the sentence by the Georgia jury. Direct use of that evidence is an important part of the process by which the Texas jury answers statutory questions, such answers in turn being determinative of the sentence. In Florida, the jury uses that evidence to arrive at an advisory sentence of death or life imprisonment. The Florida courts cannot impose a death penalty in the face of an advisory sentence of life imprisonment unless it can find the facts suggesting a sentence of death to be so clear and convincing that virtually no reasonable person could differ. The narrow scope of mitigating evidence which is available to juries in Colorado at the sentencing stage in a capital case presents a marked contrast to the Florida, Georgia and Texas patterns. Viewed from the other side of the coin, many mitigating circumstances necessary to develop facets of the character and record of the defendant as a uniquely individual human being have no relevance to the mitigating factors prescribed by law in Colorado. Colorado's statutory sentencing plan is too rigid to satisfy constitutional standards.

Consideration has been given to the possibility of construing the Colorado statute to permit introduction of a broad range of mitigating evidence. The statute is presumed to be constitutional

and must be construed to preserve its constitutionality if at all possible. See People v. Prante, 177 Colo. 243, 493 P.2d 1083 (1972). A statute can be found unconstitutional only if its unconstitutionalit is established beyond a reasonable doubt. See People v. Prante, supra The statute is explicit in authorizing presentation of evidence bearing on the statutory mitigating and aggravating factors. The jury's function is to determine whether any of these mitigating factor or aggravating factors exist. There would be no legitimate use to which the jury could put evidence in mitigation not relevant to the statutory mitigating factors. Any attempt to construe the Colorado statute to permit consideration and use of mitigating evidence not relevant to the statutory mitigating factors would do violence to the statutory pattern and would constitute impermissible judicial amendment of the legislative enactment. It also would invite impermissible jury nullification. See Woodson v. North Carolina, supra, at p. 2990 of 96 S.Ct.; Stanislaus Roberts v. Louisiana, supra, at p. 3007 of 96 S.Ct.

Accordingly, it is concluded that the imposition of the death sentence pursuant to Colorado statute for the offense with which the defendant is charged would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States of America. Whether the

Colorado Constitution imposes a higher standard is unnecessary to consider.

Defendant has urged other bases upon which he contends that the death sentence could not become a permissible sentencing alternative in his case. These will be considered briefly but not in detail in view of the conclusion expressed above.

Vagueness of Statutory Mitigating Factors:

Defendant contends that the statutory mitigating factors, except for age, are too vague to be applied. The same challenge to strikingly similar mitigating circumstances was raised and rejected in Proffitt v. Florida, supra. The Court said at p. 2969 of 96 S.Ct:

> "While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a fact finder in a lawsuit."

See also, Jurek v. Texas, supra, at p. 2957 of 96 S.Ct.

Failure to provide objective standards to guide the jury in imposition of the penalty of death:

Except as defendant imports objections to the availability and scope of appellate review, limitation of evidence in mitigation, allocation of burden of proof and other objections separately stated, his argument of failure to provide objective standards seems to be a variant of the vagueness argument, considered above, with respect to statutory mitigating factors. The only aggravating factor which reasonably could be contended to be vague is the final factor "He committed the offense in an especially heinous, cruel or depraved manner." C.R.S. 16-11-103(6)(i) (1973). Florida has a similar standard, except that "atrocious" is substituted for "depraved". The Florida Supreme Court has construed the standard to be directed only at the conscienceless or pitiless crime which is unnecessarily torturous to the victim. As so construed, the United States Supreme

Court held that "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." Proffitt v. Florida, supra, at p. 2968 of 96 S.Ct. See Gregg v. Georgia, supra, at p. 2938 of 96 S.Ct. The Court in Proffitt also found not impermissibly vague the standard that "the defendant knowingly created a great risk of death to many persons,", a standard similar to the penultimate aggravating circumstance in the Colorado statute. C.R.S. 16-11-103(6)(h) (1973).

Failure to provide for appellate review:

As pointed out in the briefs, the availability and scope of appellate review of jury findings at the sentencing stage of a first degree murder trial in Colorado are not at all clear. In Gregg v. Georgia, supra, in which the jury had the sentencing authority, the Court considered Georgia's elaborate appellate procedures for assuring proportionality of sentences to be important to the validity of the procedure for imposing the death penalty. In Florida, where they jury makes a nonbinding sentencing recommendation, the state supreme court took a similar review role on its own initiative without specific statutory authority, and this was considered important to the validity of the Florida system in Proffitt v. Florida, supra. Texas too has appellate review of the jury's decision, which includes a prediction of probabilities that the defendant would commit acts of violence that would constitute a continuing threat to society. Under the Colorado system, the appellate courts are given no legislative authority to review for proportionality. The limited evidence relevant to the mitigating and aggravating factors in many cases would inhibit the appellate court from evaluation and comparison necessary to determine proportionality of sentences. It appears that there is a substantial question whether

the Colorado appellate review procedure is adequate to assure that the death penalty will not be arbitrarily or capriciously imposed. In view of the fact that the statute has been found infirm for another reason, and in view of the absence of guidelines at this time as to how the Colorado appellate courts will view their own roles on appeal, this issue will not be pursued to the extent necessary to make a definite determination.

Failure to show that the death penalty fulfills a compelling state interest which could not be fulfilled by a less drastic means:

Defendant argues that substantive due process requires that the state demonstrate that the death sentence is the least restrictive means to further a compelling government interest.

In Gregg v. Georgia, supra, it was held that the punishment of death does not invariably violate the constitution and that a Court

> "...may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." 96 S.Ct. at p. 2926

The Court went on to hold the death penalty constitutional as a penalty for murder under the procedure prescribed by Georgia for its imposition. Thus, defendant's argument, to the extent it is founded upon the United States Constitution, is not well taken.

Defendant urges a substantive due process analysis. The analysis proceeds from the characterization of life as a fundamental constitutional right. Infringement of a fundamental constitutional right must be subjected to strict scrutiny under a due process analysis. This requires the state to demonstrate a compelling government interest to support the infringement and to find an absence of less restrictive means to realize that compelling government interest. The analysis then proceeds to attempt to show

that the death penalty is not the least restrictive means available to satisfy the government interest to protect society from murderers and to deter murders. Such an analysis has been used by the Massachusetts Supreme Court in invalidating the imposition of the death penalty for the crime of murder committed in the course of a rape or an attempted rape under the Massachusetts declaration of rights.

The United States Supreme Court plurality has not analyzed the issue in such terms. Gregg v. Georgia, supra. Of course, the Colorado courts are free to adopt such analysis in construing the Colorado Constitution. It is unnecessary to embark on such an analysis in view of the conclusion reached above, and it would be unwise to do so absent the necessity therefor.

Violation of due process concepts of proof beyond a reasonable doubt and presumption of innocence:

The defendant argues from cases requiring the People to prove every element of their case, including negation of affirmative defenses, beyond a reasonable doubt that such a burden is constitutionally required in establishing aggravating circumstances and eliminating mitigating circumstances at the penalty stage. No case is cited directly in support of this proposition. Nothing in the Gregg, Proffitt, Jurek, Woodson, Stanislaus Roberts line of cases suggests such a requirement. The People take the position in their brief that they have the burden to establish aggravating factors and to negate the existence of mitigating factors. Even if this burden can be borne by establishing such matters by a preponderance of the evidence, no constitutional infirmity is perceived in use of such a procedure at the sentencing stage.

Based upon the foregoing Memorandum Opinion, it is found that the Colorado statutory procedures for imposition of the death

penalty violate the prohibition against cruel and unusual punishment under the United States Constitution beyond a reasonable doubt; accordingly,

IT IS ORDERED THAT the motion to strike the death penalty from consideration in this case be granted.

Defendant has moved for a bill of particulars with respect to the aggravating circumstances upon which the People will rely; based upon the foregoing order, it is found that the motion for bill of particulars is moot.

Done this 27 day of December, 1977.

BY THE COURT:

George E. Bell

District Judge

16-11-103. Imposition of sentence in class 1 felonies. (1) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment. The hearing shall be conducted by the trial judge before the trial jury as soon as practicable. If a trial jury was waived or if the defendant pleaded guilty, the hearing shall be conducted before the trial judge.

(2) In the sentencing hearing any information relevant to any of the aggravating or mitigating factors set forth in subsection (5) or (6) of this section may be presented by either the people or the defendant, subject to the rules governing admission of evidence at criminal trials. The people and the defendant shall be permitted to rebut any evidence received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any of the factors set forth in subsection (5) or (6) of this section.

(3) After hearing all the evidence, the jury shall deliberate and render a verdict, or if there is no jury the judge shall make a finding, as to the existence or nonexistence of each of the factors set forth in subsections (5) and (6) of this section.

(4) If the sentencing hearing results in a verdict or finding that none of the factors set forth in subsection (5) of this section exist and that one or more of the factors set forth in subsection (6) of this section do exist, the court shall sentence the defendant to death. If the sentencing hearing results in a verdict or finding that none of the aggravating factors set forth in subsection (6) of this section exist or that one or more of the mitigating factors set forth in subsection (5) of this section do exist, the court shall sentence the defendant to life imprisonment. If the sentencing hearing is before a jury and the verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(5) The court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:

(a) He was under the age of eighteen; or

(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or

(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

(d) He was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

(6) If no factor set forth in subsection (5) of this section is present, the court shall sentence the defendant to death if the sentencing hearing results in a verdict or finding that:

(a) The defendant has previously been convicted by a court of this or any other state, or of the United States, of an offense for which a sentence of life imprisonment or death was imposed under the laws of this state or could have been imposed under the laws of this state if such offense had occurred within this state; or

(b) He killed his intended victim or another, at any place within or without the confines of a penal or correctional institution, and such killing occurred subsequent to his conviction of a class 1, 2, or 3 felony and while serving a sentence imposed upon him pursuant thereto; or

(c) He intentionally killed a person he knew to be a peace officer, fireman, or correctional official. The term "peace officer" as used in this section means only a regularly appointed police officer of a city, marshal of a town, sheriff, undersheriff, or deputy sheriff of a county, state patrol officer, or agent of the Colorado bureau of investigation; or

(d) He intentionally killed a person kidnapped or being held as a hostage by him or by anyone associated with him; or

(e) He has been a party to an agreement in furtherance of which a person has been intentionally killed; or

(f) He committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used in this paragraph (f), explosive or incendiary device means:

(I) Dynamite and all other forms of high explosives;

(II) Any explosive bomb, grenade, missile, or similar device; or

(III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone; or

(g) He committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, he intentionally caused the death of a person other than one of the participants; or

(h) In the commission of the offense, he knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(i) He committed the offense in an especially heinous, cruel, or depraved manner.

Source: Repealed and reenacted, L. 74, p. 252, § 4.

Editor's note: This section became effective January 1, 1975, and applies to offenses occurring on or after said date.

IN THE DISTRICT COURT
IN AND FOR ~~XXXX~~ THE COUNTY OF PITKIN
AND STATE OF COLORADO

Criminal Action Number C-1616

Hearing Set
June 9 9:00 AM

THE PEOPLE OF THE STATE
OF COLORADO,
Plaintiff,

vs.

THEODORE ROBERT BUNDY,
Defendant.

MOTION FOR THE RETURN OF DEFENDANT'S PERSONAL PROPERTY AND DISPOSITION OF DEFENDANT'S LEGAL FILES

Following my departure from the confines of the Garfield County Jail on December 30, 1977, it is my understanding that the contents of my cell were seized by the Garfield County Sheriff's Department. This Motion seeks the return to me of my personal property which the Garfield County Sheriff does not have reason to believe has evidentiary value for any prosecution which might result in the wake of my escape.

So there is no misunderstanding about my knowledge of my Constitutional right to remain silent and be assisted by counsel in this matter, let me state that I understand that I have the right to remian silent, and the right to appointed counsel should I be unable to afford private counsel. Any statement I make in this Motion is made knowingly, freely and voluntarily with full knowledge of the legal consequences thereof.

On December 30, 1977, I escaped from the Garfield County Jail. My escape was in no way facilitated by the privileges I received because I was representing myself in the above-captioned action. I feel obliged to make this statement since I am sure that there are those who will attempt to project their own culpability for my escape to Judge Lohr. It should be noted that after my first escape from the Pitkin County Courthouse in June, 1977, Judge Lohr went out of his way to recommend increased security measures and granted all prosecution requests designed to assure that I would not escape again. In the final analysis, it is I who must assume responsibility for my escape, but in a broader sense, those who brought me to Colorado to stand trial in a case where they had virtually no evidence against me must assume some of the burden also. They should have left me alone in Utah.

Colorado Bar Association
Advance Sheet Headnotes
October 23, 1978

No. 27963 PEOPLE V. DISTRICT COURT

No. 28017 BROWN V. DISTRICT COURT

No. 28049 PEOPLE V. DISTRICT COURT

Original Proceeding (Interlocutory Appeal)

Death Penalty (Mitigating Factors)

Death Penalty (Judge and Jury; Facts Concerning Particular Offender and Offense)

Death Penalty (Objective Standards; Aggravating Factors)

Death Penalty (§16-11-103, C.R.S. 1973 (1976 Supp.); Aggravating Factors)

Death Penalty (Mitigating Factors; Construction)

Death Penalty (Mitigating Factors; Construction)

Death Penalty (§18-1-409, C.R.S. 1973; Appellate Review)

Although an original proceeding is not ordinarily available as a means for obtaining an interlocutory appeal, the Supreme Court elected to address the issue presented in this case because of the threshold question relating to the application of the death penalty in a number of cases pending in the Colorado courts.

A death penalty statute is unconstitutional if the judge or jury is precluded from considering as a mitigating factor any relevant information pertaining to the defendant' character or record or the circumstances of the offense.

A judge or jury, in considering the death penalty, must be allowed to consider all possible relevant information about the individual defendant whose fate it must determine.

A death penalty statute, to be constitutional, must set out objective standards to help the judge or jury to differentiate between those cases in which the death penalty may be imposed from those in which it which it may not. To this end, the legislature may set out aggravating factors which justify imposition of the death penalty, or it may narrow the definitions of the crimes for which that penalty may imposed to the same purpose.

§16-11-103 sets out eight aggravating factors to help the jury to determine whether the death penalty should be imposed. The court

expressed no opinion about whether this enumeration was constitutionally sufficient.

§16-11-103 sets out five mitigating factors for the judge or jury to consider. Although any information relevant may be introduced concerning those factors, such information may only be introduced on the enumerated factors.

The enumerated factors cannot be construed to allow a defendant to introduce all mitigating factors on his own behalf, since those factors (1) limit admissible evidence to that concerning the time of the offense; (2) prevent the defendant from introducing mitigating circumstances if he maintains his innocence; (3) do not allow the defendant to introduce all the mitigating facts which the United States Supreme Court has declared are constitutionally mandated; and (4) prevents the defendant from introducing evidence to show that he has or could in the future render some service to the community, by virtue of which he should not be sentenced to death.

In view of the court's ruling that §16-11-103 is unconstitutional, it need not decide whether §18-1-409 precludes the court from reviewing a sentence of death.

IN THE SUPREME COURT
OF
COLORADO

NO. 27963

THE PEOPLE OF THE STATE OF COLORADO, by and through their duly appointed representative, FRANK G. E. TUCKER, DISTRICT ATTORNEY, Petitioner, v. THE DISTRICT COURT OF THE STATE OF COLORADO, GEORGE E. LOHR, AS ONE OF THE DISTRICT COURT JUDGES OF THE DISTRICT COURT, Respondent.	OCT 23 1978

Frank G. E. Tucker, District Attorney,
Robert L. Russel, District Attorney,
Milton K. Blakey, Chief Deputy District Attorney,

Attorneys for Petitioner.

Kenneth Dresner,
Kevin O'Reilly,

Attorneys for Respondent.

and

NO. 28017

NOLAN L. BROWN, DISTRICT ATTORNEY IN AND FOR THE FIRST JUDICIAL DISTRICT, COUNTY OF JEFFERSON, STATE OF COLORADO,

Petitioner,

v.

THE DISTRICT COURT IN AND FOR THE FIRST JUDICIAL DISTRICT, STATE OF COLORADO, and THE HONORABLE MICHAEL C. VILLANO, ONE OF THE JUDGES THEREOF,

Respondents.

Original Proceeding

Nolan L. Brown, District Attorney,
Joseph Mackey, Deputy District Attorney,

Attorneys for Petitioner.

J. Gregory Walta, Colorado State Public Defender,
Craig L. Truman, Chief Deputy State Public Defender,
Norman R. Mueller, Deputy State Public Defender,

Attorneys for Respondents.

and

NO. 28049

THE PEOPLE OF THE STATE OF COLORADO ex rel. ROBERT R. GALLAGHER, JR., DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT, STATE OF COLORADO,	)
Petitioner,	)
v.	)
THE DISTRICT COURT, IN AND FOR THE EIGHTEENTH JUDICIAL DISTRICT, COUNTY OF ARAPAHOE, STATE OF COLORADO, and THE HONORABLE WILLIAM B. NAUGLE, ONE OF THE JUDGES THEREOF,	)
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Original Proceeding

EN BANC RULE DISCHARGED

Robert R. Gallagher, Jr., District Attorney,
James C. Sell, Chief Deputy District Attorney,

Attorneys for Petitioner.

Kenneth K. Stuart,
Jane S. Hazen,

Attorneys for Respondents.

MR. JUSTICE ERICKSON delivered the Opinion of the Court.

Three different district court judges have held that the Colorado death penalty statute, section 16-11-103, C.R.S. 1973 (1976 Supp.), is unconstitutional. The prosecution, in all three cases, has sought review in these original proceedings. In each case, we issued a rule to show cause and now discharge the rule.

Ordinarily, an original proceeding is not available as a means for obtaining an interlocutory appeal. C.A.R. 21.1. Interlocutory appeals are only permitted in limited circumstances provided by C.A.R. 4.1. We have elected to address the issue in these cases because of the threshold question relating to the application of the death penalty in a number of pending cases in the Colorado Courts.

In the three cases before us, it is conceded that the death penalty would have been an issue for the judge or jury to resolve under our bifurcated procedure. Section 16-11-103, C.R.S. 1973 (1976 Supp.). The facts of the particular cases are not material to a determination of the constitutional issues which we must resolve.

The Colorado death penalty statute represents the attempt by the General Assembly to comply with the ambiguous directives of the Supreme Court of the United States in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and its progeny, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929

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The United States Supreme Court's seminal opinion in Furman v. Georgia, supra, created considerable confusion concerning the circumstances under which the death sentence could be constitutionally imposed. The Supreme Court, in invalidating the Georgia death penalty statute, supported their result with a short per curiam opinion and nine separate opinions, some of which are basically irreconcilable. No unifying rationale was provided for the guidance of legislative bodies of the different states. The elements of a constitutional death penalty statute have been touched on, without clarity of definition, in a number of later cases from that Court.

In 1976, the Supreme Court expanded on some of the views expressed in Furman. See Gregg v. Georgia, supra; Jurek v. Texas, supra; Woodson v. North Carolina, supra; Proffitt v. Florida, supra. Again, the Supreme Court's inability to agree on a set of principles within which to judge a particular statute made it difficult for a state legislature to enact a

constitutionally valid death penalty. All that the majority of the court endorsed is that under some circumstances, and subject to a number of limitations, the death penalty may be imposed.

Finally, during this last term, four Justices of the United States Supreme Court have seen fit to "reconcile previously differing views in order to supply that guidance." Lockett v. Ohio, supra, at 2965. Chief Justice Burger, together with Justices Stewart, Powell, and Stevens, have expressed their opinion that a death penalty statute is unconstitutional if the judge or jury is:

> "[P]recluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant[s] proffer as a basis for a sentence less than death." Id. at 2965.

When the views of those four Justices are joined with those of Justice Marshall, who has declared that, in his view, any death penalty statute is unconstitutional,[1] it is apparent that Colorado's death penalty statute cannot withstand constitutional examination in the United States Supreme Court.

We start from "the predicate that the death penalty qualitatively differs from any other sentence." Lockett v. Ohio, supra, at 2964. Lockett v. Ohio is the latest edict from the Supreme Court, and it has advised legislative bodies that the qualitative difference between the death

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penalty and other punishments requires that before the solemn act of condemning another human being to death may be carried out, the Eighth and Fourteenth Amendments of the United States Constitution[2] require that the judge or jury in every case must:

> "[B]e allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. . . . What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, supra, at 271 (plurality opinion, Stevens, J.). (Emphasis added)

The Colorado statute in issue was drafted before the Lockett opinion was announced. All three trial judges have properly held that section 16-11-103, C.R.S. 1973 (1976 Supp.), violates the constitutional commandment now set forth in the Lockett case, because it does not allow the sentencing entity -- in these cases, the jury -- to hear all the relevant facts relating to the character and record of the individual offender or the circumstances of the particular case. Woodson v.North Carolina, supra, at 304 (plurality opinion, Stewart, J.).

A statute must meet at least two requirements before it can serve as the basis for imposition of the death sentence. First, it must provide a "meaningful basis for distinguishing the . . . cases in which it is imposed from [those] in which

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it is not." Furman v. Georgia, supra, at 313 (White, J., concurring). To do so, the statute must contain "objective standards to guide, regularize and make rationally reviewable the process for imposing a death sentence." Woodson v. North Carolina, supra, at 303 (plurality opinion, Stewart, J.). To attain this end, the legislature may enumerate specific aggravating factors, the presence of which will serve to justify the imposition of a sentence of death, Gregg v. Georgia, supra; Proffitt v. Florida, supra, or the legislature's "action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose." Jurek v. Texas, supra, at 270 (plurality opinion, Stevens, J.).[3]

The second requirement is that, as noted above, the defendant must be allowed to present any relevant information as to why the death sentence should not be imposed upon him.

Colorado statutes provide a bifurcated proceeding for these cases in which the death penalty is sought. At the first stage of the proceedings, the substantive question of the defendant's guilt is tried. If he is convicted of a class one felony, such as first degree murder, the same jury then hears evidence concerning the proper penalty. Section

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[3] Section 16-11-103(6), C.R.S. 1973 (1976 Supp.) adopts the first alternative by listing several aggravating factors. We express no opinion whether this enumeration is constitutionally sufficient.

16-11-103(5), C.R.S. 1973 (1976 Supp.) lists five mitigating factors on which the defendant may present evidence. Section 16-11-103(6) lists eight aggravating factors which the People may prove were involved in the commission of the crime. If the jury finds that none of the mitigating circumstances, and any one of the aggravating circumstances, existed at the time the crime was committed, it must impose the death sentence. Any other combination of findings results in a sentence of life imprisonment. In pertinent part, Section 16-11-103 provides:

> "(2) In the sentencing hearing any information relevant to any of the aggravating or mitigating factors set forth in subsection (5) or (6) of this section may be presented by either the people or the defendant, subject to the rules governing admission of evidence at criminal trials. The people and the defendant shall be permitted to rebut any evidence received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any of the factors set forth in subsection (5) or (6) of this section. . . .
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> . . . .
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> "(5) The court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:
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> "(a) He was under the age of eighteen; or
>
> "(b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or
>
> "(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

"(d) He was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

"(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."

The people would have us construe Section 16-11-103(2), C.R.S. 1973 (1976 Supp.) so as to allow the judge or jury to hear all relevant mitigating facts about the offender and his offense, as required by Lockett, supra. We are unable to do so. Subsection (2), although it speaks of "any information relevant," clearly precludes the offender from proffering any information unless it is relevant to the mitigating factors "set forth in subsection (5)."

In lieu of a finding that we can read subsection (2) to meet the constitutional requirements of Lockett, the people would have us construe subsection (5) to allow the offender to present the necessary information in mitigation. Again, we decline. We note a number of impediments to such a construction.

First, subsection (5) only allows the jury to consider whether the enumerated factors were in existence "at the time of the offense." Nothing in the numerous United States Supreme Court decisions cited above supports such a limitation. See Commonwealth v. Moody, 382 A.2d 442, 449-50, n. 19 (Pa. 1977).

Second, factors (5)(b) through (5)(e) are all in the nature of affirmative defenses. Thus, if the offender maintains his innocence, he is precluded from offering any mitigating circumstances at all, except that he is under the age of eighteen.

Third, subsection (5) does not permit the offender to attempt to establish a number of mitigating circumstances which are among those the Supreme Court has declared the judge or jury must be allowed to consider.

> "Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts . . . ." Harry Roberts v. Louisiana, supra, at 637.

> "[A]ny special facts about this defendant that mitigate against imposing capital punishment (e.g., . . . the extent of his cooperation with the police, his emotional state at the time of the crime." Gregg v. Georgia, supra, at 197 (plurality opinion).

An offender would also be precluded by subsection (5) from proving to the judge or jury that he has rendered or could in the future render some service to his community, in light of which capital punishment should not be imposed. In short, subsection (5) prevents consideration of a host of "factors too intangible to write into a statute." Gregg v. Georgia, supra, at 222 (White, J., concurring); factors "which a jury might . . . consider mitigating and, as a result, might . . . be moved to impose a life sentence."

Jones v. People, 155 Colo. 148, 150, 393 P.2d 366 (1964); see also Richmond v. Cardwell, 450 F.Supp. 519 (D. Ariz. 1978).

Defendants also urge that the death penalty may not be imposed in Colorado because those sentenced to death by a jury could not obtain constitutionally adequate appellate review. In support of that contention, they point to Section 18-1-409, C.R.S. 1973, which provides:

> "Appellate review of sentence for a felony. (1) When sentence is imposed upon any person following a conviction of any felony, other than a class 1 felony in which the penalty was decided upon by a verdict of the jury, the person convicted shall have the right to one appellate review of the propriety of the sentence, having regard to the nature of the offense, the character of the offender, and the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based."

In view of our decision that section 16-11-103, C.R.S. 1973 (1976 Supp.) is unconstitutional, we need not reach the question whether section 18-1-409 precludes review of a death sentence by this court.

Accordingly, the rule to show cause is discharged.

Colorado Bar Association
Advance Sheet Headnotes
October 23, 1978

No. 27963 PEOPLE V. DISTRICT COURT

No. 28017 BROWN V. DISTRICT COURT

No. 28049 PEOPLE V. DISTRICT COURT

Original Proceeding (Interlocutory Appeal)

Death Penalty (Mitigating Factors)

Death Penalty (Judge and Jury; Facts Concerning Particular Offender and Offense)

Death Penalty (Objective Standards; Aggravating Factors)

Death Penalty (§16-11-103, C.R.S. 1973 (1976 Supp.); Aggravating Factors)

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The Colorado statute in issue was drafted before the Lockett opinion was announced. All three trial judges have properly held that section 16-11-103, C.R.S. 1973 (1976 Supp.), violates the constitutional commandment now set forth in the Lockett case, because it does not allow the sentencing entity -- in these cases, the jury -- to hear all the relevant facts relating to the character and record of the individual offender or the circumstances of the particular case. Woodson v.North Carolina, supra, at 304 (plurality opinion, Stewart, J.).

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Third, subsection (5) does not permit the offender to attempt to establish a number of mitigating circumstances which are among those the Supreme Court has declared the judge or jury must be allowed to consider.

> "Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts . . . ." Harry Roberts v. Louisiana, supra, at 637.

> "[A]ny special facts about this defendant that mitigate against imposing capital punishment (e.g., . . . the extent of his cooperation with the police, his emotional state at the time of the crime." Gregg v. Georgia, supra, at 197 (plurality opinion).

An offender would also be precluded by subsection (5) from proving to the judge or jury that he has rendered or could in the future render some service to his community, in light of which capital punishment should not be imposed. In short, subsection (5) prevents consideration of a host of "factors too intangible to write into a statute." Gregg v. Georgia, supra, at 222 (White, J., concurring); factors "which a jury might . . . consider mitigating and, as a result, might . . . be moved to impose a life sentence."

Jones v. People, 155 Colo. 148, 150, 393 P.2d 366 (1964); see also Richmond v. Cardwell, 450 F.Supp. 519 (D. Ariz. 1978).

Defendants also urge that the death penalty may not be imposed in Colorado because those sentenced to death by a jury could not obtain constitutionally adequate appellate review. In support of that contention, they point to Section 18-1-409, C.R.S. 1973, which provides:

> "Appellate review of sentence for a felony. (1) When sentence is imposed upon any person following a conviction of any felony, other than a class 1 felony in which the penalty was decided upon by a verdict of the jury, the person convicted shall have the right to one appellate review of the propriety of the sentence, having regard to the nature of the offense, the character of the offender, and the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based."

In view of our decision that section 16-11-103, C.R.S. 1973 (1976 Supp.) is unconstitutional, we need not reach the question whether section 18-1-409 precludes review of a death sentence by this court.

Accordingly, the rule to show cause is discharged.

June 1976

Gregg v Ga. 19-3250
Proffitt v Fla 19-3274
Jurek v Tex 19-3282
Woodson v N.C. 19-3287
Roberts v La 19-3301

Furman v Georgia 408 U.S. 238 (1972)

24 2356 - Follow Proffitt v. Fla. - State v. Lee Aug - 12/6/74.
2207
2259
2527. — State v. Simant - Nebr. 2/2/77
— Aggravator must be proved beyond reas. doubt. —

1. Mot. for Appt. of Exp. Path. July 14
2. Mot. for Discovery — June 20, 1977
3. " " Restn. of Phone. —
4. Mot to Strk Public. — July 14, ↳ (Mot. for Certif. — Subp. other States. ↳) 5 July to take position. —

Motion to Suppress Aug 24, 1977
— Copy of 3 Mo.

— All Prior Ct. Orders — Cont'd. — in effect. ↳
— ∑ Move Re: civ. clothes. —

File Motion on incoming calls!

Mo. to Reinstate!

↳ Cond. - each call placed by deputy —
- Each case - Identity to be verified. —
—

Sheriff not to monitor content. —
- Keep list ↳ charges. ↳ # - Persons. —
- Prep Written Order.

MAY 23

① PRIOR ORDER - Dr. Cunningham — NO REPORT

Contact Sheriff. —

② Order - Physical Exam — effect this!

MOTION for ~~B~~ DISCOVERY —

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PITKIN

STATE OF COLORADO

Criminal Action No. C-1616

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. THEODORE R. BUNDY Defendant.	)	MEMORANDUM BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF THE COLORADO DEATH PENALTY SENTENCING STATUTE

I.

INTRODUCTION

The purpose of this memorandum brief is to analyze the Colorado procedure for sentencing a defendant after a conviction of a Class 1 felony. This brief will examine the history of litigation before the United States Supreme Court concerning capital punishment as it relates to the cruel and unusual clause of the Eighth Amendment. Particular emphasis will be placed on the most recent, post Furman v. Georgia cases which, of course, are of significance because they mark the first time in recent history where the Court upheld the validity of capital punishment per se. Additionally, the new procedural requirements mandated by the Court will be analyzed and compared to C.R.S., 1973, 16-11-103; entitled Imposition of Sentence in Class 1 Felonies.

This brief, in no way, will attempt to answer or address itself to the issues presented in the brief submitted by the Public Defender's office. That brief was originally prepared for the Plaintiff in the case of People v. Wildermuth. The purposes of the People's brief, on the contrary, is an attempt to guide the trial Court in appropriately evaluating

the constitutionality of the Colorado Statute in question. In order for the Court to do that, however, the Court must be apprised of the historical and analytical development of the death penalty sentencing statutes and what that development means to the constitutionality of the Colorado Statute in question. This memorandum brief has not been designed as an argumentative reply to the irrelevancies in the Public Defender's challenge to the constitutionality of the Colorado Sentencing Statute.

II.

BACKGROUND:

THE DEVELOPMENT OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE

A. Definition of Cruel and Unusual Punishment

The phrase "cruel and unusual punishment," was itself a subject of much juducial controversy in early years as an attempt was made to conceive a generally accepted understanding of its scope. The history of Supreme Court litigation concerning capital punishments indicates that the precise contours of the phrase were defined with some difficulty. However, from early on the Court was confident that "unnecessary cruelty" was the underlining concept of the cruel and unusual punishment prohibition. Wilkerson v. Utah, 99 US 130, 135-36 (1879). The notion of proscribing unnecessary cruelty is clearly the cornerstone of the eighth amendment's meaning.

As the concept "cruel and unusual" was further articulated in Supreme Court cases, it became apparent that capital punishment was not among those punishments constitutionally proscribed. In Re Kemmler, 136 US 436, 447 (1890). Death sentences fell outside the ban because they did not involve torture or lingering death. Furthermore, despite the ultimate

nature of the punishment, it was not considered inhumane or barbarous, generally due to its long history of acceptance.

An advanced articulation of this Eighth Amendment concept was provided in Weems v. United States, 217 US 349 (1910). The Court in Weems invalidated for the first time a legislatively established penalty as "cruel and unusual," holding that as a "precept of justice punishment for crime should be graduated and proportioned to the offense," Id., 217 US 367. The Court thereby recognized that not only could the method of punishment be inherently cruel, as are acts of torture, but the punishment may be excessive when compared to the offense and hence cruel and unusual. In Weems, fifteen years at hard labor in ankle chains was held to be excessive for the crime of falsifying government records. The Weems decision was, however, largely overlooked by succeeding Courts mainly because the eighth amendment was not considered applicable to the States at that time. Collins v. Johnson, 237 US 502 (1915); In Re Kemmler, 136 US 436 (1890). Furthermore, although Weems did not involve capital punishment, it introduced a characterization of the eighth amendment which would have a significant impact on later death penalty decisions. The Court characterized cruel and unusual as being a dynamic, flexible concept which was subject to modification. The constitutional clause was said to be "progressive and not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Weems v. U.S., 217 US 378. In later years, this notion was seized upon by several justices, in the capital punishment context, in arguing that society had progressed to the point where the death penalty had become cruel and unusual. Furman v. Georgia, 408 US 238, 291 (Brennan J., concurring); 408 US 360 (Marshall, J., concurring).

Almost fifty years after Weems, the Supreme Court reconsidered the scope of the Eighth Amendment in Trop v. Dulles, 350 US 86 (1958). The Court in Trop ruled that denationalization of a convicted war time deserter, who had already served three years at hard labor, forfeited all pay, and received a dishonorable discharge amounted to a cruel and unusual punishment. The Court held that deprivation of a man's political existence affronted the dignity of man, the basic concept behind the Eighth Amendment. The meaning of the phrase "cruel and unusual" is not static referring only to punishments considered abhorrent in 1789. Rather the Amendment derives current meaning from the "evolving standards of decency that mark the progress of the maturing society," 356 US 101.

With its decision in Robinson vs. California, 370 US 660, the Supreme Court revitalized the principals it expounded in Weems. The Court ruled that incarceration for ninety days for being addicted to the use of narcotics was excessive and thus in violation of the eighth amendment. As in Weems, the Court was concerned with the excessive nature of the punishment in relation to the offense. It noticed that the cruel and unusual punishment clause must be continually reviewed in light of contemporary human knowledge to determine its current meaning. Robinson also removed any lingering doubts that the eighth amendment is applicable to the States through the Fourteenth Amendment. Francis v. Resweber, 329 US 459 (1947).

The next stage of development in this area witnessed the eighth amendment acquire a new meaning, quite different from prior considerations. The Court remained steadfast in its refusal to consider the basic issue; does the death

penalty per se violate the eighth amendment? However, by finding procedural defects in various sentencing processes, the Court skillfully refused to sanction a death sentence while avoiding this ultimate decision. The procedural analysis was wholly unprecedented. Thus it was justifiable to hypothesize that the Court was using the procedural technique as a means of preparing the public for a major policy change.

There are several illustrations of this technique in Supreme Court cases. For example, under the Federal Kidnapping Act, the death penalty was a potential punishment only if the accused demanded a jury trial. The Act was held unconstitutional because it imposed "an impermissible burden upon the exercise of a constitutional right." United States v. Jackson, 390 US 570, 572 (1968).

Further eighth amendment protection was provided when the defendant entered a guilty plea. It became unconstitutional for a trial Court to accept a guilty plea to a capital offense without an affirmative showing that the guilty plea was entered intelligently and voluntarily. Boykin v. Alabama, 395 US. 238, 242 (1969). The eighth amendment insured protections greater than examining the nature of the punishment itself. The defendant was provided procedural protection at the pre-trial stage when a plea was entered and when electing to try the case before a judge or a jury.

Thus, although the pattern was clear it was not without deviation. As each confrontation brought the Court closer to the ulitmate issue, further procedural demands could be found which would postpone the final decision. This evasive technique was employed by the Supreme Court for a twenty-three year period beginning in 1957. In 1970, however, the Court reversed the trend of refusing to affirm

a death sentence, when it allowed the jury to impose the death penalty in a procedure void of governing standards. McGautha v. California, 402 US 183. Such a process was acceptable because it was thought to be impossible to articulate standards which would adequately enable the jury to differentiate between the situations meriting a death sentence and those which did not. Although the future direction of the Court was uncertain as a result of this change, procedural considerations remain very much a part of eighth amendment analysis. But the relevant significance of procedural matters in relation to the punishment itself was less certain. Apparently, the procedures resulting in the death sentence were beginning to overshadow the character of the punishment itself.

Thus, State Court decisions notwithstanding, by 1972 several aspects of "cruel and unusual" had been fairly well established while others remained uncertain. Therefore, the significance of the historical acceptance of punishments was uncertain. The Court almost invariably considered whether the punishment in issue had been traditionally accepted, despite the evolving standards doctrine it simultaneously espoused. More importantly, it was not certain whether the practice of reversing death sentences had been abandoned entirely. All of this took on new meaning as the cases of Furman v. Georgia, Jackson v. Georgia and Branch v. Texas, 408 US 238 (1972), were decided.

B.

Furman v. Georgia

In Furman v. Georgia, 408 US 238 (1972), the Supreme Court held in a per curiam decision that in the cases before it, the imposition and carrying out of the death penalty constituted a cruel and unusual punishment in violation

of the eighth and fourteenth Amendments. At the time Furman was decided, forty-one states, the District of Columbia, and several federal jurisdications authorized the death penalty. However, by any standard, the imposition of that penalty was infrequent. In 1970 only one hundred and twenty-seven people received the death sentence; in 1971 the number dropped to one hundred and four and to a low of seventy-five in 1972; Furman v. Georgia, 96 S. CP. 2909, 2029 n. 26. The infrequency of use prompted some commentators to conclude that the Supreme Court could, and should, declare the death penalty unconstitutional. Goldberg and Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1818-19 (1970). Thus, the Court was being pressured to finally rule on the constitutionality of the punishment per se. It is with this background in mind that Furman should be read so as to better understand the full importance of this landmark case.

The opinion is incredibly simple considering the complexity of the issue involved:

> Certiorari was granted limited to the following question; "Does the imposition and carrying out the death penalty in these cases constitute cruel and unusual punishment in violation of the eighth and fourtheenth amendments?" The judgment in each case is reversed in so far as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. Id., 408 US at 239-40.

However, nine separate opinions were issued, each Justice expressing his own view on the matter before the Court. This reflects the true nature of the controversy more so than the per curiam opinion. Five Justices supported the per curiam judgement while four dissented.

For the purposes of this memorandum brief only, the opinion of Justice Marshall, concurred in by four other

Justices, and the dissenting opinion of Justice Burger are relevant to the case in question and the Colorado Statute before the Court. For the "majority," Mr. Justice Marshall asserted that the most important principal in analyzing the cruel and unusual clause is that its language "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Therefore, a penalty which was acceptable at one time in our history may be cruel and unusual now. The permissiblity of a particular punishment today is open to question regardless of previous decisions. This rational allowed Mr. Justice Marshall to ignore those previous decisions - Wilkerson and Resweber and Kemmler - which tacitly approved of the death penalty.

After reviewing the reasons why a legislature might select death as a punishment, which included; retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, and eugenics and economy, Marshall argued that all of these legislative purposes could be accomplished through less severe penalties. Marshall contends that punishment for the sake of retribution is not permitted by the eighth amendment. (As will be noted, infra, this now is the "minority" position). Moreover, capital punishment is not necessary as a deterrent to crime in this society, in fact, murderers are extremely unlikely to be recidivists and often become model citizens. Id., 408 US at 355. Marshall also reasons that the elimination of the death penalty would not impair the States bargaining position in obtaining confessions and guilty pleas since the threat of imprisonment would be sufficient for this purpose. Further, capital punishment can not be defended on the ground that it improves society since legislatures

have never intented eugenic goals in formulating death sentences. Finally, the death penalty can not be defended as economical since execution is actually more costly than life imprisonment. Since any possible legitimate purpose of capital punishment could be served equally well by imprisonment, Justice Marshall concluded that the death penalty is excessive punishment and is, therefore, unconstitutional. Id., 408 US at 359.

Marshall narrowed the test often used by the Courts that a punishment is valid unless "it shocks the conscience and sense of justice of the people," to include only "informed citizens." Justice Marshall argues that if the average citizen were informed as to the liabilities of the death penalty, he would conclude, as Marshall does, that the death penalty is both cruel and unusual. Justice Marshall contends that even the strongest proponent of the death penalty would find it unacceptable if he were aware that the death penalty is meted out discriminatory, that innocent people have been executed, and that the death penalty distorts our system of criminal justice, undesirably affecting the jury, attorneys, the judge, and the public during the course of certain trials. Ehrman, The Death Penalty and The Administration of Justice, 284 Annals 73, 83, (1952).

The dissenting opinion of Chief Justice Burger contains an analysis of whether the eighth amendment prohibits capital punishment and a plea for judicial non-involvement on the issue of abolition of the death penalty. It begins with an examination of the scope of the prohibition against cruel and unusual punishments. According to Chief Justice Burger's interpretation the founding fathers were most concerned with tortuous or excessively cruel punishments. Early Supreme Court decisions reflected this concern and

focused primarily on whether the punishment was "cruel" rather than whether it was "unusual". Wilkerson v. Utah, 99 U.S. 130 (1878). (See Part II A of this Memorandum)

Despite past indications of constitutionality, the Chief Justice acknowledges that whether capital punishment is cruel and unusual today must be determined by reference to contemporary standards of permissibility. Past decisions have recognized that interpretations of the eighth amendment prohibition necessarily change as the mores of society change. However, Chief Justice Berger counsels judicial restraint when a court is asked to interpret societal mores. No judicially manageable technique has been developed for measuring an evolution in society's moral consensus on capital punishment. Thus the courts must refer to the legislatures when such a judgment is needed.

The Chief Justice then asserts there are no obvious indications of societal condemnation of capital punishment sufficient to overcome the presumption of legislative validity. Public opinion polls show no universal rejection of capital punishment. Further, Chief Justice Burger rejects the contention put forth by Justices Marshall and Brennan that the infrequent imposition of the death penalty reflects widespread disapproval by society. It is argued that, in capital cases where juries impose death, they are acting arbitrarily and without sensitivity to prevailing standards of decency. However, it is the duty of the jury to reflect contemporary standards, and there is no empirical proof that juries have failed to discharge its duty. Witherspoon v. Illinois, 391 US 510 (1968). The declining rate of imposition does not establish that capital punishment is now considered intolerably cruel.

Neither of these two divergent opinions state the law as it is today. In fact, what has evolved is a hybrid and, at the same time, collateral approach to the problem. Hybrid; in that the court has now displaced much of the eighth amendment back to the legislatures but, as will be shown, infra, not totally. Collaterally; in that what is now the main focus of the court's attention lies in the procedural safeguards which insure due process and the lack of an arbitrary, capricious and freakish imposition of the death sentence. Determination of the current view, however, can only be best understood by the past historical and procedural development of the death sentence as cruel and unusual.

Reaction to the court's decision in Furman, was immediate, mixed and intense. Proponents of capital punishment were naturally disappointed. However, opponents of the death sentence were not totally satisfied either, as many of them felt the court should have found the punishment to be per se violative of the eighth and fourteenth amendments. After the courts announcement in Furman it would have been reasonable to conclude that the legislative response would weigh heavily on a subsequent decision of the court for two reasons. First, the Furman majority had forced legislators to enact new statutes in order to reinstate the death penalty. Should the legislatures reconsider the issue and conclude that the death penalty merited revitalization, the majority of the court would likely to be bound to strongly reconsider their respective positions. If, in light of Furman, the State legislatures had deemed reinstatement of capital punishment a worthwhile effort, it would indicate the possibility of a judicial misreading of then current opinion.

Second, the four dissenters felt it unwise to intrude into legislative decisions. Therefore, if only a small number of legislatures were to reinstate the death penalty, it is possible the dissenters would have felt justified in overruling these few states; for clearly that predominant legislative opinion would be opposed to capital punishment.

Following Furman, the state legislatures passed capital punishment provisions in unprecedented volume. By 1976, 35 states passed death sentence statutes. In 1974, Congress itself enacted a statute providing for the death penalty when aircraft piracy resulted in death. Anti-Hijacking Act of 1974, 49 U.S.C. §1472(i),(n). Clearly, a majority of states were willing to test the court's conviction.

This responding legislation is of two major types. First, the majority of state statutes provide for a mandatory death sentence upon conviction of a specified crime. Second, a small number of statutes call for a balancing of aggravating and mitigating circumstances before the sentence is imposed. The Colorado statute, of course, specifically provides for an aggravating-mitigating circumstances test. Thus, the stage was set for the court to once again hear argument on the issue of cruel and unusual punishment as it applied to capital punishment.

III.

THE 1976 CASES:

MANDATORY AND NON-MANDATORY DEATH SENTENCES

A. MANDATORY DEATH SENTENCES

Both North Carolina's and Louisiana's mandatory death penalty statutes were held in Woodson v. North Carolina, 96 S.Ct. 2978, and Roberts v. Louisana, 96 S.Ct. 2001, to fall

short of the eight amendment's imperative that in capital cases the character and record of the offender and the circumstances of the particular offense should be considered prior to sentencing. The North Carolina statute imposed a mandatory death sentence upon any defendant convicted of First Degree Murder. The Louisiana statute mandated a death penalty whenever a conviction was obtained for any one of five categories of homicide, regardless of any mercy recommendation by the jury. N.C. Gen. Stat. §14-17(Cum. Supp. 1975). In both cases, a 5-4 majority held that the state plan failed to provide a constitutionally tolerable response to Furman. With Justice Stewart writing the plurality opinion, the history of mandatory death penalties was examined. It was the plurality's impression that such penalties have been rejected as "unduly harsh and unworkably rigid." The plurality identified three constitutional infirmities in those states' use of a mandatory death penalty for First Degree Murder. First, the fact that juries impose the death penalty in only a small percentage of the cases in which they may exercise discretion suggests that, at least to the extent that jury sentencing reflects contemporary standards of decency, a system that automatically executes everyone convicted of a certain crime fails to meet those standards.

The second infirmity follows from the first: juries unwilling to impose the death sentence on inappropriate offenders would begin to select some defendants among those whom they considered guilty beyond a reasonable doubt for whom they would return a verdict of not guilty. Since this exercise of discretion would be undirected, the requirement of Furman that "objective standards be provided to guide,

regularize and make rationally reviewable the process for imposing a sentence of death" would not be met. Woodson, supra, 96 S.Ct. at 2991. Indeed, this infirmity was aggravated in the case of Louisana statute by its requirement that the jury in every murder case be instructed on the crimes of First Degree Murder, Second Degree Murder, and Manslaughter, whether or not there was any basis in the evidence for the latter offenses. La. Code Crim. Proc. Ann. Arts. 809, 814 (West Supp. 1975). This requirement invited juries to return a lesser verdict inconsistent with the evidence when they decided, without statutory guidance, that the death sentence was unwarranted.

Finally, and most importantly, the "enlightened policy" of requiring a sentencing procedure to consider more than the statutory description of the offense rises to a constitutional imperative when a life is at stake:

> "In capital cases the fundamental respect for humanity underlying the eighth amendment... requires consideration of the character and record of the individual offender and the circumstances of the particular offense..." 96 S.Ct. at 2991

The somewhat narrower definition of the capital offense provided by the Louisiana statute did not suffice to free it from this invalidating lack of individual focus.

After an examination of the history of mandatory death penalties, the plurality noted that many juries, finding the death penalty too severe in a significant number of cases, refused to return guilty verdicts since such verdicts would automatically have sentenced the defendants to death. In response to this reluctance to return guilty verdicts, legislatures began to enact laws which would allow juries to distinguish between murderers, to exercise discretion, and to take mitigating circumstances into account in sentencing

for capital cases. By the time the court decided Furman in 1972, mandatory sentences were widely disfavored by both legislatures and juries, which the plurality concluded was evidence that evolving standards of decency had come to reject such penalties as violating societal standards. In light of this widespread rejection of mandatory death sentences, the Stewart plurality reasoned that states enacting mandatory penalties after Furman must have done so in an attempt to respond to the confusion generated by the Furman opinion and not because of the renewed social acceptance of mandatory death sentences. Finally, the Stewart plurality, taking the historical development into account, held the North Carolina statute invalid for failing to allow mitigating circumstances to be considered before the sentence of death is imposed. Because of the qualitative difference between the death penalty and prison sentences, the Stewart plurality concluded that the fundamental respect for human dignity underlying the eighth amendment requires factors relating to the defendant to be taken into account during sentencing. Woodson, supra, 96 S.Ct. at 2991 2992.

It is submitted that the Colorado statute in question is in no way a mandatory death penalty statute. None of the constitutional defects pointed out in both Woodson and Roberts exists in the Colorado statute. In fact, it is arguable that the plurality's conclusion in Woodson that society has rejected mandatory sentencing does not square with its willingness in the Gregg, infra, opinions to defer to the state's legislative determinations concerning capital punishment. As Justice White noted in his dissent, the fact that legislatures before Furman chose jury sentencing to avoid the problems of jury nullification was not a legislative

judgment that mandatory punishments were excessively cruel. While the states thus showed a preference for discretionary sentencing, it was also true that they preferred mandatory penalties to no death sentence at all. Roberts, supra, 96 S.Ct. at 3019. Further, while the plurality found proof of societal rejection of mandatory sentencing to jury nullification, it did not adequately deal with the incontrovertible fact that since Furman the death penalty has regularly been imposed under mandatory statutes. Finally, it is not clear why the requirement that the individual characteristics of the criminal and the crime be considered before sentencing may not be satisfied by a legislative judgment that the commission of certain, especially heinous, crimes conclusively establishes a criminal's character. The plurality seriously undermined its position in this regard by noting in Roberts that murder by a prisoner serving a life sentence was a "unique problem" and it could justify a mandatory death sentence. Id., 96 S.Ct. at 3006-07 n.9. Notwithstanding this analytical defect, however, the Colorado statute cannot be scrutinized by either the Woodson or Roberts decisions. It cannot for one primary and uncontroverted reason. The Colorado statute requires the jury to take into consideration mitigating and aggravating circumstances before the sentence of death is imposed. Thus, the mandatory death sentence cases can only be used as one of the parameter positions regarding the imposition of the death penalty.

B. NONMANDATORY DEATH SENTENCE STATUTES: GREGG v. GEORGIA, PROFFITT v. FLORIDA and JUREK v. TEXAS

In Gregg v. Georgia, 96 S.Ct. 2909 (1976), Troy Gregg was charged with committing armed robbery and murder.

In accordance with Georgia procedure in capital cases, the trial proceeded in a bifurcated manner; the determination of guilt was followed by a separate sentencing stage. The jury found Gregg guilty of two counts of armed robbery and two counts of murder. The penalty stage took place before the same jury. The judge instructed the jury that it could recommend either the death penalty or life imprisonment, but it could not authorize the imposition of the death sentence unless it found, beyond a reasonable doubt, one of three aggravating circumstances. The jury ultimately found the first and second of the aggravating circumstances to exist and returned a sentence of death on each count.

Gregg v. Georgia was joined by two companion cases for arguments before the Supreme Court. Those cases, Proffitt v. Florida, 96 S.Ct. 2960 (1976), and Jurek v. Texas, 96 S. Ct. 2950 (1976) held that their respective states had devised statutes permitting capital punishment which could pass constitutional muster. In each of these three cases and the two mandatory death sentence cases, supra, the Court heard two major issues:

(1) Does the penalty of death for the crime of murder constitute a per se violation of the eighth and fourteenth amendments, and

(2) if not, does the particular death penalty statute in question create a substantial risk that the death penalty might be inflicted in an arbitrary and capricious manner, thus violating the eighth and fourteenth amendments?

After reviewing the few cases that have involved substantial eighth amendment claims, Justice Stewart, writing for the majority, distilled two tests the amendment poses

for criminal sanction: the sanction must meet "the evolving standards of decency that mark the progress of a maturing society," and it must "accord with the dignity of man, which is the basic concept underlying the eighth amendment." In support of its conclusion that the death penalty meets contemporary standards of decency, the plurality cited its long history of acceptance in the United States and England, the flurry of new death penalty statutes enacted after Furman, and the continued willingness of juries after Furman to impose the penalty. Id., 96 S.Ct. at 2929. All-in-all, seven of the Justices reached the conclusion that capital punishment does not constitute a per se violation of the Constitution. The finding of the constitutionality rested upon four major considerations: (1) the long history of judicial acceptance; (2) contemporary societal acceptance of the punishment; (3) the useful social purposes served by the sentence; and (4) the proportionality of the punishment to the particular crimes considered.

Although the plurality recognized that the eighth amendment should be interpreted in a flexible and dynamic manner, they noted that history and precedent supported the constitutionality of capital punishment. Thus, the plurality strictly adhered to the two-pronged test of Trop, supra. While verbally espousing a dynamic interpretation of "cruel and unusual" the court nevertheless appeared inextricably bound to consider historical acceptance as well. If the evolving standards approach was the sole test, reference to the framers would be unnecessary. It is evident that, regardless of formal nomenclature, the court was most sensitive to the concepts of stare decisis and precedent, and made its rule accordingly.

The court did not, however, neglect the contemporary standards aspect of the constitutionality test and, in fact,

concluded that capital punishment was acceptable to society. As a basis for this conclusion, the plurality noted that both legislatures and juries had recently expressed approval of the death penalty.

The plurality also viewed the jury as a "significant and reliable objective index of contemporary values". Gregg, supra, 96 S.Ct. 2929. Justice Stewart was not convinced that the infrequent imposition of the death sentence was caused by rejection of capital punishment per se. Rather, he felt it indicated that jurors selected only the most atrocious crimes as meriting the ultimate sanction. Combining jury and legislative acceptance, the court concluded that contemporary society was not offended by capital punishment.

The burden of showing that the death penalty is unnecessary and, therefore, unconstitutional is a heavy one, since the plurality in Gregg would invalidate a penalty only if it is "totally without penelogical justification." Id., 96 S.Ct. at 2930. The plurality stated that the death penalty was popularly regarded as serving two principle social purposes: retribution and deterrence of capital crimes by prospective offenders.

The Gregg plurality noted that "capital punishment was an expression of society's moral outrage" at particularly heinous conduct and recognized retribution by itself as a legitimate penelogical goal. Noting that empirical evidence neither supported nor refuted a deterrent effect, the majority felt it safe to assume that for some crimes the penalty did provide significant deterrence. Furthermore, since legislatures deemed the death penalty to have such a deterrent effect, Steward would not dispute that conclusion and on that basis hold the death penalty unconstitutional. Turning

to the requirement of proportionality, the plurality asserted that the penalty, although "unique in its severity and irrevocability," is not always disporportionate to the crime of murder.

Having found that the death penalty is not inherently cruel and unusual, the court examined each challenged statute to determine whether the specific method it provided for imposing the penalty violated the eighth amendment. The severity of the penalty had made the court unwilling in Furman to allow its application to be determined by the discretion of a sentencing body unless "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id., 96 S.Ct. at 2932. Despite its recognition that discretion is exercised by the executive branch on numerous occasions in both the pre-trial and post-trial stages of the criminal process, the Court was unwilling to broaden its focus to include such sources of possible arbitrariness and refused to find in Furman a prohibition on affording mercy to selected defendants. Instead, it attempted to insure a principled application of the penalty through guidance to the sentencing body coupled with appellate review.

In the lead case of Gregg v. Georgia, supra, the Court examined Georgia's new statute and found by a 7-2 margin, that the Georgia Legislature had successfully met the requirements of Furman. The Georgia sentencing statutes permit the death penalty for five crimes in addition to murder, but the sentence attacked by the petitioner was for murder alone. The statutes called for a bifurcated trial period. The first stage is devoted to making a determination of guilt. The second stage is to determine the sentence

if the defendant is found guilty. At the sentencing stage, considerable latitude is given both the prosecutor and the defense in introducing evidence that might have a bearing on the sentencing authority's final judgment. The death penalty may only be imposed at the sentencing stage if the jury (or judge, if a bench trial) finds at least one of the statutory aggravating circumstances and then elects to impose that sentence. Even if one of the aggravating circumstances is found, mitigating circumstances brought out during the sentencing stage may influence the sentencing authority not to impose the death penalty. The aggravating circumstances are set out in GA. Code Ann. § 272534.1 (1975):

> (a) The death penalty may be imposed for the offense of aircraft hijacking or treason, in any case.
>
> (b) In all other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
>
> (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial official, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, a lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

Petitioner Gregg attacked this statutory plan as violative of the Furman requirements. He first attacked the opportunities for discretionary action under the statute, pointing in particular to the unfettered authority of the prosecutor to determine which defendants will be charged with a capital crime and which will not; the discretion of the jury to find the defendant guilty of a lesser included offense; and the discretion of the governor and the Board of Pardons

and Paroles to commute a death sentence. The Stewart plurality noted that these charges were little more than "a veiled contention that Furman indirectly outlawed capital punishment by placing total unrealistic conditions on its use." Id., 96 S.Ct. 2937 n. 50. According to the Stewart plurality, Furman held only that in order to avert a capricious and arbitrary use of the death penalty, the decision of when and how to use it had to be guided by standards focusing attention on the particular offense and offender. Thus, the existence of the various discretionary stages inherent in the criminal justice system was not a relevant factor concerning issues raised before the court.

The petitioner next charged that the statutes were so vague and broad that they left the juries "free to act as arbitrarily and capriciously" as before in determining a sentence. The Stewart plurality disagreed.

The third flaw the petitioner presented was that the statutes fell short of the requirements of Furman because the juries could refuse to impose the death penalty even if one or more of the aggravating factors were found. The Stewart plurality declared that this attack misinterprets Furman:

> Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

Finally, the petitioner objected to the wide scope of evidence and argument that is allowed at the sentencing stage of the trial. The plurality quickly disposed of this argument by saying that the more argument and evidence

presented, the better the opportunity for the jury to assess whether to impose the death penalty. Id., 96 S.Ct. at 2939.

In conclusion, the Stewart plurality stated that the basic concepts of Furman "centered on those defendants who were being condemned to death capriciously and arbitrarily." Under the present Georgia plan, the Steward plurality concluded, a jury could no longer do what it was possible to do under the old Georgia plan; that is, it cannot impose the death penalty "wantonly and freakishly; it is always circumscribed by the legislative guidelines." Juries are now directed to focus their attention on the nature and circumstances of the wrongdoer. This, along with the appellate review, assured the Stewart plurality that the concerns that prompted the decision in Furman would not be present under the new state plan.

The statute under scrutiny in Proffitt v. Florida, supra, parallels the Georgia statute in that the Florida statute provides that both aggravating and mitigating circumstances must be taken into account. Like Georgia's statutes, the Florida statute enumerates the aggravating circumstances. It also provides for review of the sentence by the State Supreme Court, although there is no form prescribed for that review. The Florida statutes specifically enumerates some mitigating circumstances for the jury to consider, but the jury is not confined to those circumstances and may take others into consideration. The finding of the jury on sentencing is merely advisory in Florida, as the trial judge makes the final determination of the sentence. The same 7-2 majority upheld the Florida statute. The Florida Aggravating circumstances are found in Fla. Stat. Ann. §921.141 (5):

> (a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

Mitigating circumstances are found in Fla. Stat. Ann. §291.141 (6):

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

After rejecting the petitioner's attack on the statute for allowing inherent discretion thoughout the system

for the same reasons as it rejected that attack in Gregg, the Stewart plurality considered the argument that the statute was overbroad and vague allowing "virtually any first degree murder convict to be a candidate for the death sentence." Justice Stewart's opinion considered the statute's provisions as they have been construed by the Florida Supreme Court and concluded that the statute's provisions were neither impermissibly vague or of "inadequate guidance to those charged with the duty of recommending or imposing sentences."

The petitioner next charged that the statute gave no guidance to the jury or judge as to how to weigh the various mitigating and aggravating circumstances. Once again, the plurality opinion of Justice Stewart rejected the argument. The Stewart plurality found that while the decision of whether to impose the death penalty may be hard, it is basically the same type of decision that fact finders are routinely required to make. Furman's requirements are satisfied when the judge or jury responsible for sentencing is guided and channeled by special factors that argue for or against the death penalty, thus "eliminating total arbitrariness and discretion in its imposition."

The Florida statute does not provide a structured form of review by the State Supreme Court, thus opening up the process to the petitioner's charge that is necessarily unobjective and unpredictable. However, the Stewart plurality refused to find that the process was necessarily ineffective or arbitrary. On the contrary, they noted that the Florida Supreme Court had undertaken its functions responsibly. Proffitt, supra, 96 S.Ct. at 2969.

The Court upheld a third state statute by the same 7-2 margin in Jurek v. Texas, supra. Jerry Jurek was convicted of murder in the course of committing and attempting to

commit kidnapping and forceful rape upon a ten-year-old child. The Texas statutory scheme differs significantly from the previous two discussed. Of significance was the fact that Texas severely limits the categories of murder for which the death sentence may be imposed. The situations include intentional and knowing murders of peace officers and prison employees, murders for remuneration, murders committed in the course of carrying out particular felonies, and murders committed during an escape from a penal institution.

The statutory procedure calls for the jury to answer three questions. Essentially, the questions require the jury to consider: whether the defendant acted deliberately and with the reasonable expectation that death would result; whether the defendant would constitute a continuing threat to society; and whether the conduct of the defendant was unreasonable in response to any provocation which may have existed. If the jury finds that the state has proved beyond a reasonable doubt the answer to the three specified questions is yes, the death sentence is imposed. However, if the jury finds the answer to any of the questions to be no, a sentence of life imprisonment will be imposed. The Texas sentencing statute in its entirety reads as follows:

> (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

This scheme was also upheld by the Court. In announcing the plurality opinion, Justice Stewart noted that although Texas did not adopt the aggravating-mitigating circumstances approach, an identical purpose was served by narrowing the categories of crime for which the death penalty could be

imposed. The Stewart plurality held that the carefully limited scope of murder for which capital punishment can be imposed serves the same purpose as statutory aggravating circumstances, that is, to guide and channel the jury while eliminating arbitrary discretion in the determination of the sentence. This alone would not validate the Texas plan because Furman mandates that mitigating circumstances must also be taken into account. Since the statute does not specifically deal with mitigating circumstances, the Stewart plurality carefully examined the three post-conviction questions which under the statute the jury must answer affirmatively before the death sentence can be imposed.

The Stewart plurality found that the Texas Criminal Court of Appeals had indiciated in its decision of the petitioner's case that it would interpret the second question so as to allow a defendant to bring to the jury's attention whatever relevant mitigating circumstances that he may be able to show. Thus, accepting the Texas Court's interpretation of the second question, the Stewart plurality concluded that the Texas statute is consistent with the requirements of Furman. It provides for rational, even, and consistent imposition of the death penalty and is therefore constitutional. Id., 96 S.Ct. at 2958.

The significance to this particular case is that a new concept was introduced to the capital punishment issue. Justice Stewart stated that constitutional considerations required the jury to consider mitigating circumstances. As the defendant was allowed to introduce evidence of mitigating circumstances in aiding the jury's determination of the second question, the plurality concluded that the Texas procedure adequately complied with this new demand. This was held

despite the absence of explicit reference to mitigating circumstances in the statutes. Id., 96 S.Ct. at 2957.

These three landmark cases indicate that McGautha, supra, was not an anomaly in an otherwise consistent trend of cases. The court did not refuse to rule on the death penalty per se and it did not use a procedural defect to reverse a sentence of death. Rather, the Jackson line of cases is now obsolete and once again the death sentence is a viable sentencing alternative. The impact of these decisions is significant because, given the reluctance of the present Court to intervene in legislative determinations, it is highly unlikely that the Court will grant certiorari on the issue of capital punishment per se in the immediate future. Thus, any relief sought must be accomplished through either the executive or legislative branch of government.

IV.

THE CONSTITUTIONALITY OF C.R.S., 1973, 16-11-103 AFTER GREGG v. GEORGIA, et. seq.

This Memorandum Brief has sought to analyze the cases in Furman, Gregg, Proffitt, and Jurek, supra, with some degree of detail precision. The reason is an important one; the question of whether the Colorado sentencing statute, C.R.S., 1973, 16-11-103, is constitutional depends greatly upon examining that statute against the context and historical progression of the above-cited cases. The Public Defender's Brief in Wildermuth attacks the Colorado statute against an incorrect analysis and reading of these key United States Supreme Court cases. A misconstruction of these cases, or a misinterpretation of the correct constitutional questions, is as equally fatal as a misconstruction of the Colorado

statute in question. In fact, most of the Public Defender's arguments are reiterations of those issues argued by the Petitioners in Gregg, Proffitt, and Jurek, supra, all of which, it is submitted, were rejected by the Supreme Court in those cases.

This brief does not find it necessary or appropriate to reargue the already litigated issues in Gregg, et. seq., supra. What is appropriate, however, is a determination of the constitutional requirements necessary in order to uphold the state sentencing statute when death is an alternative. For these reasons, an articulation of the minimum constitutional requirements the death statutes must possess is more useful to this Court than arguments on specified issues which are either no longer relevant or have been previously litigated.

Basically, legislatures must construct sentencing standards which prohibit judges and juries from arbitrarily or capriciously imposing the death penalty. The opportunity for imposing arbitrary sentences is reduced when the Judge and jury are provided with adequate information. The Supreme Court intimated that providing for a bifurcated procedure is the best method of assuring that a jury is given adequate guidance and information. Gregg v. Georgia, 96 S. Ct. 2909, 2939. Although this procedure is not mandatory, it should receive careful consideration. The sentencing authorities should be directed to consider the specific circumstances of the crime and the individual characteristics of the defendant. The aggravating-mitigating circumstances approach fills this requirement. A knowledge of the eighth amendment history will aid in determining which circumstances to include. Historically, the eighth amendment has proscribed barbarious and inhumane punishments as well as those which are disproportionate to the crime committed. Naturally, the death

penalty must be justified in these terms. Coker v. Georgia, 45 U.S.L.W. 3249. Therefore, the mitigating and aggravating circumstances should aid in explaining the reasons why the death sentence is humane and proportional to the crime which was perpetrated. C.R.S., 1973, 16-11-103, comports with all of these requirements.

In fact, a comparison of the Colorado mitigating-aggravating factor statute with the like statutes of Georgia, Florida and Texas, indicates that Colorado's is quite similar. That similarity is applicable in two differing, although parallel, ways: One; a plain reading comparison of these statutes shows closely drawn factors and procedures (the People feel it is not necessary to take this Court through these step-by-step; the similarities are obvious on their face); Two, the legislative intent in Colorado's statute is exactly as were those statutes in Gregg, Proffitt, and Jurek, supra. That is, to provide a sentencing procedure which allows a meaningful resolution of a factual determination within limits which prevent an arbitrary or capricious application of death as the "ultimate resolution."

The statute clearly must allow the judge and jury to consider both the aggravated and mitigating circumstances. However, it is not essential that the statutes specifically enumerate both types. Rather, the constitutional requirements are met if, somewhere in the sentencing process, be it by way of jury instruction, the answers to specific questions, or other means, due consideration is given to the reason the death penalty should not be imposed. Gregg v. Georgia, 96 S.Ct. at 2956.

Colorado, of course, has adopted the approach which conforms most strenuously to assuring that the imposition of the death penalty will not be freakish or arbitrary. That

approach is to require the prosecutor to prove at least one aggravating factor and disprove all the mitigating factors which may, potentially, be at issue. A comparison of the Colorado factors with those factors in Gregg, Proffitt, and Jurek, supra, supports the constitutionality of the Colorado procedure. (See Section III B of this Memorandum).

More generally, in either the legislative or judicial context, it is well to note the evils the eighth amendment is designed to curb. The eighth amendment, as interpreted by the Court, prevents two primary abuses. Clearly, it prohibits inhumane and barbarious punishments. Additionally, though, it minimizes the possibility of irrational and inconsistent imposition of the death penalty. With these considerations in mind, statutes and litigating strategy must be formulated which adequately deal with the recent Surpreme Court rulings. Appropriately, the Colorado statute in question has adequately been tailored to meet the constitutional requirements in Gregg, et. seq., supra.

One additional issue is of noteworthy importance: Does Colorado provide for meaningful judicial review of death sentences in Class 1 Felonies?

Article VI, Section 2 of the Colorado Constitution fixes the Appellate jurisidiction of the Colorado Supreme Court. It reads, in part:

> (2) Appellate review by the Supreme Court of every final judgment of the District Courts, the Probate Court of the City and County of Denver, and the Juvenile Court of the City and County of Denver shall be allowed and the Supreme Court shall have such other Appellate review as may be provided by law . . . (emphasis added).

C.R.S., 1973, 16-11-103, provides for a sentencing hearing to be held upon conviction of guilt of a Class 1

Felony. The procedure is finalized by the Court, either by imposing a sentence of death or life imprisonment. The sentence, therefore, becomes a judgment of the District Court and is reviewable as such by the Supreme Court.

A heavy burden is on the defendant to show grounds to hold the Colorado statute unconstitutional. In fact, that burden has been characterized as one that is beyond a reasonable doubt. Cavanaugh v. People, 61 Colo. 292, 157 P.200. People v. Howe, -- Colo. --, 496 P2d 1040. Consistent with that burden is the generally accepted and applied rule that if a statute can be construed as constitutional, that statute shall be so construed. People v. Praute, 177 Colo. 243, 493 P2d 1083 (1972).

This Court, however, need not chose to apply the above analysis to the Colorado Supreme Court's reviewability of a Class 1 Felony sentence in Colorado. Clearly, the Supreme Court may review the sentencing hearing, and its evidentiary basis just as it does that portion of the trial held on the merits directed toward guilt. If a judgment can be reversed, as a matter of law and right, on evidence insufficient to meet the burden which that judgment reflects, then certainly the Supreme Court has the ability to review the sentencing hearing under the same standard. The general appellate rights of any defendant are reflected in several areas of Colorado criminal and appellate law. One; Colorado Appellate Rules 4 (b):

> (b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the trial court within thirty days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment

> or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made within ten days after entry of the judgment. When an appeal by the state or people is authorized by statute, the notice of appeal shall be filed in the trial court within thirty days after the entry of the judgment or order appealed from. All such appeals shall be filed in Supreme Court. A judgment or order is entered within the meaning of this section (b) when it is entered in the criminal docket. Upon a showing of excusable neglect the trial court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed thirty days from the expiration of the time otherwise prescribed by this section (b).

Under this rule any defendant convicted of any class felony has appellate remedies as a matter of right. In fact, a sentence of death must be stayed upon the filing of a notice of appeal. C.A.R. 8.1 (a)(1). This rule is codified in C.R.S., 1973, 16-12-101.

Two; Colorado Appellate Rules, 4 (c)(1):

> (c) Appellate Review of Sentences.
>
> (1) Availability of Review. When sentence is imposed upon any person following a conviction of any felony in which the sentence was imposed by the Court, the person shall have the right to one appellate review of the propriety of the sentence, having regard to the nature of the offense, the character of the offender, the public interest, and the sufficiency and accuracy of the information on which the sentence was based. (emphasis added)

This rule is mandatory. Upon conviction of any felony the person convicted shall have the right to one appellate review of the propriety of the sentence.

Three; C.R.S., 1973, 18-1-410:

> 18-1-410. Postconviction remedy. (1) Notwithstanding the fact that no review of a conviction of crime was sought by appeal

within the time prescribed therefor, or that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make applications for postconviction review. An application for postconviction review must, in good faith, allege one or more of the following grounds to justify a hearing thereon:

(a) That the conviction was obtained or sentence imposed in violation of the constitution or laws of the United States or the constitution or laws of this state;

(b) That the applicant was convicted under a statute that is in violation of the constitution of the United States or the constitution of this state, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(c) That the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(d) That the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

(e) That there exists evidence of material facts, not theretofore presented and heard, which, by the exercise of reasonable diligence, could not have been known to or learned of by the defendant or his attorney prior to the submission of the issues to the court or jury, and which requires vacation of the conviction or sentence in the interest of justice;

(f) (I) That there has been sufficient change in the law, applied to the applicant's conviction or sentence, allowing in the interest of justice retroactive application of the changed legal standard;

(II) The ground set forth in this paragraph (f) may not be asserted if, prior to filing for relief pursuant to this paragraph (f), a person has not sought appeal of a conviction within the time prescribed therefor or if a judgment of conviction as been affirmed upon appeal.

(g) Any grounds otherwise properly the basis for collateral attack upon a criminal judgment; or

(h) That the sentence imposed has been fully served or that there has been unlawful revocation of parole, probation, or conditional release.

> (2) Procedures to be followed in implementation of the right to postconviction remedy shall be as prescribed by the rule of the supreme court of the state of Colorado.

Here, every defendant has a second right of review notwithstanding the fact that his judgment was affirmed upon a direct appeal.

Finally; Colorado Rules of Criminal Procedure 35 (a):

> (a) Correction of Illegal Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a remittitur issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the appellate court denying review, or having the effect of upholding a judgment of conviction. The court may not reduce a sentence reviewed by an appellate court pursuant to C.A.R. 4(c) except as ordered by the reviewing court. The court may also reduce a sentence upon revocation of probation as provided by law.

It is arguable, under a 35 (a) motion that a defendant, convicted of a Class 1 Felony, has collateral review remedies pursuant to C.R.C.P. 35 (a). The People, in this memorandum brief, take no position concerning this argument as it is presently before the Colorado Supreme Court in the case of Ferrel v. People, S.Ct. No. 27715.

The above appellate rights are important under C.R.S., 1973, 16-11-103, for one reason: What is reviewable under the "guilt" phase of the bifurcated procedure is reviewable under the "sentencing" phase too. Clearly this statutory procedure does not contemplate a new trial on the merits for every Class 1 Felony. Indeed, often the prosecution will merely refer the jury's attention to that evidence received under the "guilt" phase (or substantive phase) in order to prove or disprove one or more of the aggravating or mitigating

factors. If that evidence is reviewable as of right in the "guilt" phase and is refered to or duplicated in the "sentencing" stage, then obviously the same appellate standards of review apply. C.A.R. 4 (b); C.A.R. 4 (c).

Therefore, this court is left with several alternative positions that are provided for a defendant convicted in Colorado of a Class 1 Felony and sentenced to death. As the Public Defender points out in the Wildermuth brief; C.R.S., 1973, 18-1-409 excludes direct appellate review of a sentence imposed by a jury for a Class 1 Felony. Colorado Appellate Rule 4 (c)(1) does not, however, and, therefore, this rule coupled with the postconviction remedies in C.R.S., 18-1-410, the illegal sentence review in Colorado Rules of Criminal Procedure 35 (a) and the general appellate review of right as reflected in Colorado Appellate Rules 4 (b), 8.1 (a)(1) and C.R.S., 1973, 16-12-101, satisfies the constitutional requirements of appellate review as enumerated in Gregg, et. seq., supra. (See part III B of this Memorandum). Indeed, the state of Florida did not have a precisely delineated review procedure of its death sentences in Proffitt, supra. The Supreme Court, however, after noting that the Florida statute did not prescribe a distinct form for review, refused to find that the process was necessarily ineffective or arbitrary and, in fact, that the Florida Supreme Court had undertaken its functions responsibly by utilizing those appellate procedures available and, thus, insuring meaningful appellate review of each death sentence imposed under the statute. Proffitt v. Florida, 96 S.Ct. at 2969 (See Part III B of this Memorandum). It seems clear, therefore, that the same process is available in Colorado that was available in Florida and upheld in Proffitt, supra.

The above rights constitute the basis for sufficient appellate review in order to satisfy the requirements of Gregg, et. seq., supra. This, however, is a standard of constitutional proportions, which, placed into the context of Gregg and its companion cases, show one clear constitutional need: each trial and sentencing hearing must become, at some point, reviewable on appeal. Either the People's reading of Article VI, Section 2, as applied to 18-1-409, or the general appellate procedures available to the defendant under C.A.R. 4 (b) and (c); C.A.R. 8.1 (a)(1); C.R.S., 1973, 16-12-101; C.R.S., 1973, 18-1-410 and C.R.C.P. 35 (a) satisfy the constitutional requirements of "meaningful appellate review" as required in Gregg, et. seq., supra.

In the final analysis, the Gregg plurality reached a conclusion which combined the desire to keep the death penalty as a viable punishment without the fear of arbitrariness. The result was a capital sentencing standard which fell within the outer parameters of a mandatory penalty on the one hand and a completely discretionary penalty on the other, but which combines elements of both. A statute cannot require the death penalty unless it permits sentencers to take into account the nature of the crime and the circumstances of the offense. Yet, this discretion must be so guided so that its application is as uniform as possible. The Colorado death penalty sentencing statute in question satisfies these constitutional perogatives as required in Gregg v. Georgia, et. seq., supra.

Respectfully submitted,

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